

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAFAYETTE GARTH,

Defendant-Appellant.

UNPUBLISHED
February 14, 2008

No. 276597
Wayne Circuit Court
LC No. 06-011295-01

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of a firearm during the commission of a felony, MCL 750.227b, carjacking, MCL 750.529a, and two counts of armed robbery, MCL 750.529, for which the trial court imposed a term of imprisonment of two years for felony-firearm, to be served consecutively to concurrent terms of four to ten years each for robbery and carjacking. Defendant appeals as of right, his sole issue being whether he was convicted without benefit of effective assistance of counsel. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

The prosecutor presented evidence that, on the night of August 31, 2006, outside a party store in Detroit, defendant, in the company of two others, displayed a gun, he and his companions robbed both victims, and then defendant demanded the keys to a parked car belonging to one victim and drove off in it. At trial, both victims unequivocally identified defendant as the gunman. Defendant's sole basis for alleging that trial counsel was ineffective is that counsel did not endeavor to call an expert in the field of eyewitness identification.

The United States and Michigan Constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. The constitutional right to counsel is a right to the *effective* assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

A defendant pressing a claim of ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Counsel's decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant emphasizes that one of the eyewitnesses originally described the gunman as six feet tall or nearly so, and the other described him as over six feet tall, but that defendant in fact stands at five feet and seven inches. Defense counsel well cross-examined that witness over that discrepancy, and presented attendant argument in the matter.

In closing argument, defense counsel stated, "These were exciting, traumatic, life-threatening situations and they affect your perception." The prosecutor responded, "It's simply called the fright and flight reaction everybody has when you're scared. When you're scared, . . . your hearing increases, your sight gets sharper. . . . Was their perception affected? Sure it was. It got stronger. Their senses got stronger." Defendant argues that defense counsel should have brought an expert to counter the prosecutor's assertions. However, the trial court instructed the jury that the remarks of counsel were not evidence. The arguments of which defendant makes issue simply constituted parties' respective endeavors to steer the jurors to call upon their everyday experience in ways favoring their respective positions.

From this record, assuming without deciding that the trial court would have granted a motion for an expert witness at public expense, we conclude that the lack of any such motion did not constitute ineffective assistance. In light of defense counsel's cross-examination and argument concerning identification discrepancies, the jury might have reacted negatively "to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Further, such an expert would also have been a potential weapon in plaintiff's arsenal, who would likely have looked for ways to elicit testimony to strengthen the prosecution's case. Finally, we observe that defense counsel delicately tried to instill doubts about the victims' identification of defendant generally, while emphasizing that those eyewitnesses had originally described a taller person. Instilling too much doubt about what the victims remembered in the heat of the crime would have undermined the significance of the disparity between those initial estimates of the perpetrator's height and defendant's own.

For these reasons, defendant fails to overcome the strong presumption that defense counsel's disinclination to bring an expert on eyewitness identification was sound strategy. Defendant likewise fails to show that had such a witness appeared the result would have been different.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra